

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BNSF RAILWAY COMPANY,

Plaintiff, and

UNION PACIFIC RAILROAD  
COMPANY,

Plaintiff-Intervenor

v.

TRI-CITY & OLYMPIA RAILROAD  
COMPANY LLC,

Defendant.

NO. CV-09-5062-EFS

**ORDER ENTERING COURT'S RULINGS  
FROM AUGUST 10-11, 2009  
HEARING, PART II**

A hearing occurred in the above-captioned matter on August 10-11, 2009, in Richland. Timothy R. Thornton and Leland B. Kerr appeared on Plaintiff BNSF Railway Company's (hereafter "BNSF") behalf; Paul J. Petit and Brandon L. Johnson appeared on Defendant Tri-City & Olympia Railroad Company LLC's (hereafter "TCRY") behalf; and Timothy D. Wackerbarth appeared on Plaintiff-Intervenor Union Pacific Railroad's (hereafter

1 "UP") behalf. Before the Court was BNSF's Motion for Preliminary  
2 Injunction (Ct. Rec. [3](#).) This Order serves to supplement the Court's  
3 Order Entering Court's Rulings from August 10-11 Part I (Ct. Rec. [46](#).)

#### 4 I. Background

5 The following findings of fact and conclusions of law are not  
6 binding on the Court in future proceedings in this case. Rather, the  
7 Court determines for the purposes of a preliminary injunction that these  
8 facts probably can be shown. *See, e.g., Sierra On-Line, Inc. v. Phoenix*  
9 *Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984).

10 The origins of this dispute are in the post-World War II era, when  
11 the Atomic Energy Commission (hereafter "Commission") decided to allow  
12 private companies to use the tracks that serviced the Hanford Site. In  
13 1947, the Commission granted operating rights over trackage beginning  
14 near the Kennewick-Richland border and extending beyond Richland through  
15 Hanford (hereafter "Richland Trackage") to the Pacific Railroad Company  
16 (hereafter "Pacific"), BNSF's predecessor. (Ct. Rec. 5, Ex. A.) In a  
17 separate agreement that year, Pacific obtained operating rights over UP's  
18 tracks from Kennewick up to the Richland tracks. (Ct. Rec. 5, Ex. B.)

19 The Interstate Commerce Commission (hereafter "ICC"), predecessor  
20 to the Surface Transportation Board (hereafter "STB"), approved these new  
21 operations in 1948. (Ct. Rec. 5, Ex. C). The ICC modified Pacific's  
22 Agreement with the Commission so that the Commission could not terminate  
23 the agreement unless there was a material default that Pacific failed to  
24 cure within six (6) months. *Id.*

25 In 1952, the Commission leased siding and spur tracks near the  
26 Richland Trackage to BNSF. (Ct. Rec. 5 Ex. D.) A 1961 Agreement  
superseded the 1952 lease. The 1961 Agreement not only required six (6)

1 months notice to terminate, (Ct. Rec. 5, Ex. E.), but also recognized the  
2 continuing validity of the 1947 Agreement. *Id.* In 1979, the parties  
3 amended the 1961 Agreement to remove BNSF's operating rights over some  
4 tracks and grant rights over other spur tracks. (Ct. Rec. 5, Ex. F.)

5 In 1998, the Commission transferred its interest in the Richland  
6 Trackage to the Port of Benton (hereafter "Port"). This transfer left  
7 the 1947 and 1961 Agreements in place. (Ct. Rec. 5 Ex. O.) Later that  
8 year, the Port contracted with TCRY to provide maintenance over the  
9 Richland Trackage. In 2002, TCRY and the Port entered into a new  
10 agreement under which TCRY provided rail service for the Port and  
11 maintained the tracks. (Ct. Rec. 5 Ex. I.) As part of the Port's  
12 contract with TCRY, all existing railroad contracts with the Port  
13 remained in effect, and TCRY could not modify them in any way. *Id.* at  
14 97-98. This included BNSF's contract with the Port.

15 In May 2000, BNSF and TCRY contracted to interchange cars going into  
16 the Richland Trackage. (Ct. Rec. 5 Ex. H.) They exchanged cars at the  
17 Richland Junction and TCRY served BNSF's customers along the Richland  
18 trackage for a per-car fee. This contract specifically reserved BNSF's  
19 rights under the 1947 and 1961 Agreements. *Id.* at 86.

20 The City of Richland later asked BNSF to move the place of  
21 interchange from the Richland Junction to a site farther east in  
22 Kennewick, citing noise complaints from neighbors. While BNSF reviewed  
23 this request, it discovered that it could operate its own cars on the  
24 Richland Trackage at a savings of around \$100-150 per car. BNSF believed  
25 it had the right to do this under the 1947 Agreement.

26 When BNSF informed TCRY of its intention to exercise its rights to  
operate on the Richland Trackage, TCRY objected vigorously. Its owner,

1 Randolph Peterson, threatened that, beginning July 20, 2009, "track  
2 maintenance" would prevent BNSF from using the Richland Trackage at all.  
3 Since that time, BNSF has physically been blocked from using the tracks,  
4 although TCRY has allowed UP to use it during this period.

5 BNSF filed this suit on July 20, 2009. (Ct. Rec. [1](#).) UP moved to  
6 intervene on August 4, 2009 (Ct. Rec. [26](#)), and the Court granted UP's  
7 Motion. (Ct. Rec. [46](#).)

## 8 **II. Discussion**

### 9 **A. Jurisdiction**

10 TCRY asserts that the Court must dismiss this case because the STB  
11 has exclusive jurisdiction over this case because it involves railroad  
12 operations. Alternatively, TCRY argues that STB has primary jurisdiction  
13 over this case, so the Court should stay this action pending STB  
14 resolution in order to take advantage of agency expertise.

#### 15 **1. Exclusive Jurisdiction**

16 Under 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over  
17 rail carrier transportation and the expansion or contraction of carriers'  
18 rights to operate on tracks. TCRY argues that an order recognizing  
19 BNSF's rights to the Richland Trackage would amount to an expansion of  
20 BNSF's rights, something that only the STB may do. Additionally, says  
21 TCRY, the Court would necessarily have to interpret the ICC's 1948 Order  
22 granting the parties' rights over the Richland Trackage in order to  
23 resolve this case, and section 10501(b) precludes the Court from  
24 interpreting ICC orders.

25 TCRY's arguments are unpersuasive. This dispute is over breach of  
26 the 1947 and 1961 Agreements. The STB does not adjudicate contract  
disputes. See *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212

1 (9th Cir. 2009). A favorable judgment for BNSF does not expand or alter  
2 operating rights. It merely recognizes and enforces BNSF's rights under  
3 the 1947 Agreement, which STB approved in its 1948 Order.

4 The cases TCRY cites for the proposition that STB jurisdiction is  
5 exclusive are not pertinent because they do not address § 10501(b), which  
6 is the statute TCRY states applies to this case; instead, they deal with  
7 railroad mergers and labor disputes. See *United Transp. Union v.*  
8 *Burlington N. Santa Fe R.R. Co.*, 528 F.3d 674 (9th Cir. 2008); *Ry. Labor*  
9 *Executives' Assoc. v. S. Pac. Transp. Co.*, 7 F.3d 902 (9th Cir. 1993);  
10 *AT & T Comm., Inc. v. Consol. Rail Corp.*, 285 F. Supp. 2d 649 (E.D. Pa.  
11 2003). These cases are irrelevant to this Court's jurisdiction over  
12 claims that might encroach on the STB's exclusive jurisdiction under §  
13 10501(b), and this case does not involve a merger or labor dispute.

14 Furthermore, TCRY's contention that this Court may not enforce the  
15 1948 ICC Order is incorrect. Federal courts have jurisdiction to enforce  
16 STB orders. See 28 U.S.C. § 1336(a); *Walters v. Roadway Express, Inc.*,  
17 557 F.2d 521 (5th Cir. 1977). Therefore, this Court may enforce the 1948  
18 ICC Order that approved the 1947 Agreement.

## 19 **2. Primary Jurisdiction**

20 "The doctrine of primary jurisdiction 'is a prudential doctrine  
21 under which courts may, under appropriate circumstances, determine that  
22 the initial decisionmaking responsibility should be performed by the  
23 relevant agency rather than the courts.'" *Davel Comm., Inc. v. Qwest*  
24 *Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) (quoting *Syntek Semiconductor*  
25 *Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002)).  
26 It is a discretionary doctrine that allows courts to stay proceedings  
while an administrative agency considers them. See *Chabner v. United of*

1 *Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000). There are two  
2 (2) tests in the Ninth Circuit to determine if a case is in an agency's  
3 primary jurisdiction. Under the first, "the doctrine applies where there  
4 is '1) the need to resolve an issue that 2) has been placed by Congress  
5 within the jurisdiction of an administrative body having regulatory  
6 authority 3) pursuant to a statute that subjects an industry or activity  
7 to a comprehensive regulatory scheme that 4) requires expertise or  
8 uniformity in administration.'" *Davel*, 460 F.3d at 1086-87 (quoting  
9 *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir.  
10 1987)). Under the second, the court must consider "1) whether application  
11 will enhance court decision-making and efficiency by allowing the court  
12 to take advantage of administrative expertise; and 2) whether application  
13 will help to assure uniform application of regulatory laws." *Chabner*,  
14 225 F.3d at 1051.

15 As stated above, for all its intricacy, this dispute is about a  
16 contract. Contract interpretation is not in STB's jurisdiction and does  
17 not require STB expertise, and indeed the STB refrains from arbitrating  
18 contract disputes. The Court declines to find that this case is in the  
19 STB's primary jurisdiction under either test because resolving the  
20 dispute requires only determining the parties' rights under contract, not  
21 altering rights over railroad tracks. Nevertheless, because the Court  
22 is imposing a complicated operating agreement on the parties pending this  
23 case's resolution, the Court retains the authority to delegate further  
24 disputes to the STB if technical railroad issues arise whose resolution  
25 would benefit from STB expertise.

1 **B. Preliminary Injunction**

2 Because the Court has determined it has jurisdiction over this case,  
3 it remains to be considered whether the preliminary injunction should be  
4 issued.

5 **1. Standard**

6 "A preliminary injunction is not a preliminary adjudication on the  
7 merits: it is an equitable device for preserving the status quo<sup>1</sup> and  
8 preventing the irreparable loss of rights before judgment." *Textile*  
9 *Unlimited v. A..bmhand Co.*, 240 F.3d 781, 786 (9th Cir. 2001). "A  
10 plaintiff seeking a preliminary injunction must establish that he is  
11 likely to succeed on the merits, that he is likely to suffer irreparable  
12 harm in the absence of preliminary relief, that the balance of equities  
13 tips in his favor, and that an injunction is in the public interest."  
14 *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052  
15 (9th Cir. 2009). Where, as here, a plaintiff seeks to alter the status  
16 quo by commanding a positive act, i.e., mandatory preliminary relief, a  
17 heightened standard applies and an injunction should not be issued unless  
18 the facts and law *clearly* favor the moving party. *See Dahl v. HEM*  
19 *Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (emphasis added).<sup>2</sup>

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21 <sup>1</sup>"Status quo" means the last uncontested status that preceded the  
22 pending controversy. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199,  
23 1210 (9th Cir. 2000). Given that BNSF's operating rights on the Richland  
24 Trackage are in dispute, the last "uncontested status" was TCRY  
25 conducting interchange services for BNSF.

26 <sup>2</sup>TCRY incorrectly asserts that the Ninth Circuit's heightened  
preliminary injunction standard requires a "heavy and compelling

## 2. Analysis

### a. Likelihood of Success on the Merits

The Court concludes that BNSF is likely to succeed on the merits of its claim that TCRY breached the 1947 and 1961 Agreements and subsequent addenda. In the event of a material breach by BNSF's predecessor, the 1947 agreement required that TCRY's predecessor give six (6) months notice and an opportunity to cure before terminating the agreement. (Ct. Rec. 5, Ex. B at 21.) The 1961 Agreement also required six (6) months written notice before termination. (Ct. Rec. 5, Ex. E at 54.)

TCRY breached the Agreements by blocking the transfer stations and preventing BNSF from accessing the Richland Trackage. There is no evidence that BNSF breached the Agreements in any way, much less materially, or that TCRY provided six (6) months' notice before terminating the Agreements. Further, TCRY itself has no authority to terminate the Agreements without the Port's approval. TCRY's lease with the Port states that TCRY may not terminate operating contracts that existed at the time of the lease. (Ct. Rec. 5, Ex. I at 97-98.)

Although TCRY argues that the Agreements allowed BNSF to use only the interchange facilities and not to operate on the tracks, the record clearly contradicts this argument. The 1947 Agreement clearly states that BNSF's predecessor was granted the "right to operate with its

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showing," as opposed to a clear showing. However, the Ninth Circuit case TCRY relies on - *Kikumura v. Hurley*, 242 F.3d 950 (9th Cir. 2001) - is actually a Tenth Circuit case. Several district courts have also mistakenly cited *Kikumura* as Ninth Circuit authority. See, e.g., *McDougald v. Kennett*, 2008 WL 4378073 at \*13 (D. Nev., Aug. 12, 2008).



1 employees [sic] and equipment over the existing track," not just access  
2 to the interchange facility. (Ct. Rec. 5, Ex. A at 9.)

3 Likewise, TCRY's assertion that the subsequent addenda to the  
4 original agreements and the 2002 lease between the Port and TCRY somehow  
5 abrogated BNSF's rights is also unpersuasive. As stated above, TCRY's  
6 lease with the Port explicitly left intact the Port's existing contracts  
7 with other railroad carriers. (Ct. Rec. 5, Ex. I at 97-98). The 1979  
8 Amendment did not terminate BNSF's contractual rights either, because it  
9 allowed BNSF to use certain spur and siding tracks in North Richland.  
10 (Ct. Rec. 5, Ex. F at 61.)

11 Therefore, BNSF has shown a high probability of success on the  
12 merits at this stage.

13 **b. Likelihood of Irreparable Harm**

14 BNSF has shown that it is likely to suffer irreparable harm if the  
15 injunction does not issue. If BNSF is unable to continue its rail  
16 service for customers along the disputed tracks, it is likely to lose  
17 these customers forever. The e-mail sent by one (1) disgruntled customer  
18 berating BNSF for the service interruption and rate change is an  
19 indication of likely things to come. (Ct. Rec. 5, Ex. L at 147.)  
20 Additionally, if BNSF is excluded from the Richland Trackage, many of  
21 BNSF's customers would be driven to UP because UP would be the only  
22 carrier along these tracks. If this happens, no monetary recovery at the  
23 end of this suit could compensate for loss of goodwill. *Cf. Gateway E.*  
24 *Ry. Co. v. Terminal R.R. Assoc. of St. Louis*, 35 F.3d 1134, 1140 (7th  
25 Cir. 1994) (holding that movant railroad company showed irreparable harm  
26 by loss of goodwill); *see also CSX Transp., Inc. v. Williams*, 406 F.3d  
667, 673 (D.C. Cir. 2005) (holding that customer losses resulting from

1 exclusion from tracks would cause damages so speculative as to be  
2 impossible to calculate).

3 **c. Balance of Equities**

4 The purpose of balancing the equities is to compare the harm to the  
5 moving party if the injunction is not issued to the harm to the non-  
6 moving party if the injunction is issued wrongfully. *See Stormans, Inc.*  
7 *v. Selecky*, 571 F.3d 960, 987-88 (9th Cir. 2009) (citing *L.A. Mem'l*  
8 *Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir.  
9 1980)).

10 The equities tip sharply in BNSF's favor. If BNSF is denied access  
11 to the tracks, it could lose significant business from its shipper  
12 clients. These clients may decide to use UP instead, because UP would  
13 be the only carrier along the disputed tracks. If this happened and BNSF  
14 ultimately won this case, those customers would not be likely to return  
15 to BNSF, and this loss of business opportunity and goodwill would not be  
16 compensable.

17 In contrast, any harm to TCRY from a wrongfully-issued injunction  
18 would be measurable. TCRY would recover its per-car switching fee  
19 multiplied by the number of cars BNSF operates on the Richland Trackage  
20 pending resolution of this case. Additionally, BNSF will have to return  
21 as a customer to TCRY if it loses this case in order for BNSF to serve  
22 its customers along these tracks. Therefore, the potential harm to BNSF  
23 is far greater than to TCRY.

24 **d. Public Interest**

25 Finally, the Court finds that it is in the public interest to  
26 encourage competition among the railroads and to ensure that railroad

1 service remains efficient. Therefore, all the requirements for a  
2 preliminary injunction have been met.

3 **III. Conclusion**

4 For the foregoing reasons, the Court grants BNSF's Motion for  
5 Preliminary Injunction. The terms of the Injunction shall be those  
6 agreed to by the parties in the Proposed Operating Plan the parties filed  
7 on August 14, 2009 (Ct. Rec. 52, Ex. A at 4-5.)

8 Accordingly, **IT IS HEREBY ORDERED:** BNSF's Motion for Preliminary  
9 Injunction (Ct. Rec. 3) is **GRANTED**.

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
11 this Order and distribute copies to counsel.

12 **DATED** this 28<sup>th</sup> day of September 2009.

13  
14 s/Edward F. Shea

15 EDWARD F. SHEA  
16 United States District Judge

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